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Md Hilmi bin Md Noor & Anor (suing in their personal capacities and as administrators for the deceased, Md Noor bin Mohamed) v Azman bin Ahmad & Ors

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COURT OF APPEAL (PUTRAJAYA) — APPEAL NO P-01(NCVC)(W)-209–06 OF 2014
ALIZATUL KHAIR, ABANG ISKANDAR AND ZAMANI RAHIM JJCA
21 APRIL 2016

C

Succession — Administration — Land — Name of deceased spelled differently in land office's records — Allegation that power of attorney was forged — Whether there occasioned fraud or conspiracy to defraud — Applicable standard of proof — Whether on balance of probabilities

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The appellants ('the plaintiffs') were the administrators of the estate of one Md Noor bin Mohamed ('the deceased') and had filed this suit, both in such capacity as well as in their own personal capacity. The deceased was the registered owner of a property in Pulau Pinang ('the land'). However, the proprietorship as appearing in the land office records was registered in the name/description of Mohamed Noor bin Mohamed which spelling was different from Md Noor bin Mohamed. After a search was conducted at the land office, the plaintiffs discovered that the land was transferred into the name of Sankaran Enterprise Sdn Bhd ('the third defendant'), by one Azman bin Ahmad ('the first defendant') based on the sale and purchase agreement dated 1 February 2005, for a consideration sum of RM385,388.22. The land was charged to CIMB Bank Bhd ('the sixth defendant'). According to the plaintiffs, neither the deceased nor the beneficiaries had authorised the first defendant to sell the land and therefore, the transfer and charge to the third and sixth defendants, respectively, were effected by fraud or conspiracy to defraud by all the defendants, except the second defendant. The plaintiffs commenced a suit in the High Court for declarations that the transfer of the land to the third defendant was void ab initio. The plaintiffs also sought for judgment in default of appearance against the first defendant vide encl 56. The High Court dismissed the plaintiff's claim against the third to sixth defendants and encl 56. Hence, the present appeal.

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Held, allowing the appeal in part:

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(1) There was uncontroverted evidence that the power of attorney ('POA') appointing the first defendant, pursuant to which the first defendant sold and transferred the land to the third defendant and was purported to have been executed by one 'Mohamed Noor bin Mohamed' was a forged document. The transfer of the land to the third defendant was set aside.

The charge, being a subsequent interest so registered by the sixth defendant remained good and therefore valid under the law. The land will be reverted back to the plaintiffs, subject to the sixth defendant's charge over it. The plaintiffs prayed for the third defendant to take all steps necessary to effect the transfer of the land back to the plaintiffs within 30 days from the date of the Court of Appeal's order (see paras 18 & 40).

(2) The identity cards of the plaintiffs' siblings showed that the spelling of the deceased's name was interchangeably used. The spelling of the deceased's name in his statement of service as a teacher was also interchangeably used and the deceased's identity card issued in place of the deceased's old card, was in the name of Mohamed Noor bin Mohamed. The court ordered that it shall be registered in the name that appeared on the title deed before it was transferred into the name of the third defendant but the charge as endorsed on it in favour of the sixth defendant shall remain (see paras 18 & 40).

(3) Since the High Court's decision in the main trial has been set aside, encl 56 is allowed in terms with costs. It was clear from the unrebutted evidence that the POA was a forgery and the first defendant was the person who had dealt with the POA that since led to the dispute between the various litigating parties. By being absent during the trial, he had lost the opportunity to present his version of the event (see para 41).

[Bahasa Malaysia summary

Perayu-perayu ('plaintif-plaintif') ialah pentadbir-pentadbir harta pesaka Md Noor bin Mohamed ('si mati') dan telah memfailkan guaman ini, kedua-duanya dalam kapasiti tersebut dan juga dalam kapasiti peribadi mereka sendiri. Si mati ialah pemilik berdaftar hartanah di Pulau Pinang ('tanah tersebut'). Walau bagaimanapun, pemilikan tunggal seperti yang dilihat dalam rekod-rekod Pejabat Tanah telah didaftarkan dalam nama/deskripsi Mohamed Noor bin Mohamed yang mana ejaannya adalah berbeza daripada Md Noor bin Mohamed. Selepas satu carian dilakukan di Pejabat Tanah, plaintif-plaintif mendapati bahawa tanah tersebut telah dipindah milik kepada nama Sankaran Enterprise Sdn Bhd ('defendan ketiga'), oleh Azman bin Ahmad ('defendan pertama') berdasarkan perjanjian jual beli bertarikh 1 Faberuari 2005, untuk balasan berjumlah RM385,388.22. Tanah tersebut telah digadaikan kepada CIMB Bank Berhad ('defendan keenam'). Menurut plaintif-plaintif, si mati mahu pun benefisiari-benefisiari tidak membenarkan defendan pertama menjual tanah tersebut dan oleh itu, pindah milik dan gadaian ke atas defendan-defendan ketiga dan keenam, masing-masingnya, telah dilakukan melalui fraud dan konspirasi untuk menipu oleh semua defendan-defendan, kecuali defendan kedua. Plaintif-plaintif telah memulakan guaman di Mahkamah Tinggi untuk deklarasi bahawa pindah milik tanah tersebut kepada defendan ketiga adalah tidak sah ab initio. Plaintif-plaintif juga memohon untuk penghakiman ingkar kehadiran terhadap defendan pertama melalui

A lampiran 56. Mahkamah Tinggi telah menolak tuntutan plaintif terhadap defendan-defendan ketiga hingga keenam dan lampiran 56. Justeru, rayuan ini.

Diputuskan, membenar sebahagian rayuan:

B (1) Terdapat keterangan yang tidak dipertikaikan bahawa surat kuasa wakil ('SKW') yang melantik defendan pertama, menurut mana defendan pertama telah menjual dan memindah milik tanah tersebut kepada defendan ketiga dan telah dikatakan disempurnakan oleh 'Mohamed C Noor bin Mohamed' adalah dokumen yang dipalsukan. Pindah milik tanah tersebut kepada defendan ketiga telah diketepikan. Gadaian tersebut, yang merupakan kepentingan berikutnya yang telah didaftarkan oleh defendan keenam masih baik dan oleh itu sah dari segi undang-undang. Tanah tersebut telah dikembalikan kepada D plaintif-plaintif, tertakluk kepada gadaian defendan keenam ke atasnya. Plaintif-plaintif telah memohon agar defendan ketiga mengambil segala langkah yang perlu untuk melaksanakan pindah milik tanah tersebut untuk kembali kepada plaintif-plaintif dalam tempoh 30 hari dari tarikh perintah Mahkamah Rayuan (lihat perenggan 18 & 40).

E (2) Kad-kad pengenalan adik beradik plaintif-plaintif menunjukkan bahawa ejaan nama si mati digunakan secara kesalingbolehtukaran. Ejaan nama si mati dalam penyata perkhidmatannya sebagai guru juga digunakan secara kesalingbolehtukaran dan kad pengenalan si mati yang F dikeluarkan menggantikan kad lama si mati, adalah dalam nama Mohamed Noor bin Mohames. Mahkamah telah memerintahkan bahawa ia hendaklah didaftarkan dalam nama yang tertera dalam surat ikatan hak milik sebelum ia dipindah milik kepada nama defendan ketiga tetapi gadaian tersebut sepertimana diindorskan padanya menyebelahi G defendan keenam masih kekal (lihat perenggan 18 & 40).

(3) Oleh kerana keputusan Mahkamah Tinggi dalam perbicaraan utama telahpun diketepikan, lampiran 56 dibenarkan dalam terma dengan kos. Ia jelas daripada keterangan yang tidak dipatahkan bahawa SKW adalah H satu pemalsuan dan defendan pertama merupakan seorang yang telah berurusan dengan SKW yang telah membawa kepada pertikaian antara pelbagai pihak litigasi. Dengan ketidakhadiran sepanjang perbicaraan, dia telah hilang peluang untuk mengemukakan versinya tentang kejadian tersebut (lihat perenggan 41).]

I

Notes

For cases on administration in general, see 11(2) *Mallal's Digest* (5th Ed, 2015) paras 2358–2447.

Cases referred to

Gajo Ram Basant Ram and anr v State Of Bihar AIR 1956 Pat 113, HC (refd)
Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye and 3 ors Civil Appeal No B-01–489–12 of 2014 (unreported), CA (refd)
H and others (Minors) (Child Sexual Abuse: Standard of Proof), In re [1996] AC 563, HL (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)
Lee Kim Luang v Lee Shiah Yee [1988] 1 MLJ 193 (refd)
Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2014] 9 CLJ 337, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Ram Narain Sons Ltd v Asst Commissioner Of Sales Tax 1955 AIR 765, SC (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 7 CLJ 584, FC (refd)
Tan Kah Khiam v Liew Chin Chuan & Anor [2007] 2 MLJ 445, CA (folld)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (folld)

Legislation referred to

Age of Majority Act 1971 s 2
Evidence Act 1950 s 114(g)
Limitation Act ss 9, 29
National Land Code ss 340(2), (2)(b), (3), 430

Appeal from: Civil Suit No 21NCVC-17–04 of 2012 (High Court, Penang)

Zainur Zakaria (Reza Rahim with him) (Reza Rahim) for the appellant.
Vijaya Segaran (Maxwell Kenion Cowdy & Jones) for the third respondent.
Aliza Sulaiman (Selangor State Legal Advisor Office) for the fourth respondent.
Ahmad Rizal bin Abd Hamid (Rizal & Hafez) for the fifth respondent.
Cynthia Lee Bee Gaik (Anual & Foong) for the sixth respondent.

Abang Iskandar JCA (delivering judgment of the court):

BACKGROUND FACTS OF THE CASE

[1] Md Hilmi bin Md Noor and Mohd Ghazali bin Md Noor ('the plaintiffs') are the administrators of the estate of one Md Noor bin Mohamed ('the deceased'). They had filed this suit, both in such capacity as well as in their own personal capacity.

[2] The deceased was the registered owner of a property known as Lot 534 held under GM186, Mukim 11, Daerah Barat Daya, Bayan Lepas, Pulau Pinang ('the land'). However, the proprietorship as appearing in the land office records was registered in the name/description of *Mohamed* Noor bin Mohamed which spelling was different from *Md* Noor bin Mohamed.

[3] The original title deed was in the possession of the plaintiffs, who at all material times, paid the quit rent of the land.

[4] The deceased passed away on 18 June 1990.

[5] On 28 January 2010, after a search was conducted at the land office, the plaintiffs discovered that the land was transferred into the name of Sankaran Enterprise Sdn Bhd ('the third defendant'), by Azman bin Ahmad ('the first defendant') based on the sale and purchase agreement dated 1 February 2005, for a consideration sum of RM385,388.22 ('the SPA'). The land was charged to CIMB Bank Bhd ('the sixth defendant').

[6] The plaintiffs also pleaded that neither the deceased nor the beneficiaries had authorised the first defendant to sell the land. So the plaintiffs claimed that the transfer to the third defendant and the charge (in favour of the sixth defendant) were effected by fraud or conspiracy to defraud by all defendants (except the second defendant).

[7] The plaintiffs in this suit claim, inter alia, for the followings:

(a) a declaration that the transfer of the land to the third defendant is void ab initio; and

(b) a declaration and any consequential order for the title or ownership of the land be registered in the name of the deceased in place of *Mohamed Noor bin Mohamed* (as presently registered).

[8] Since the first defendant had defaulted in appearance, the plaintiffs also sought for the judgment in default of appearance vide encl 56, after leave was obtained from the court to proceed with the trial against the first defendant, though he had been adjudicated as a bankrupt.

[9] The High Court dismissed the plaintiffs' claim against the third to sixth defendants and encl 56 was also dismissed, thus this appeal before us by the plaintiffs.

THE APPEAL

[10] During the submissions before us, the main issue had been on the question of whether the learned trial judge had been correct when he had decided that on the evidence before him, the plaintiffs had not succeeded in establishing that their deceased father whose name was described as 'Md Noor bin Mohamed' was the same person described as 'Mohamed Noor bin Mohamed'. The latter described name had appeared in the deed of indenture dated 4 July 1934 as the purchaser of the subject property referred to in the said deed.

[11] We had perused the records of appeal and the submissions, both oral and written by all parties before us on this issue. For convenience, parties in this appeal will be referred to in their original capacity in the court below. The learned trial judge ruled that the plaintiffs had failed to prove that crucial fact based on two main reasons as can be gleaned from his grounds of judgment. We now reproduce the relevant portions of his grounds of judgment pertaining to that issue. At para 15 of his grounds of judgment, the learned trial judge had, under the heading of 'Was there sufficient evidence to hold as a fact that Md Noor bin Mohamed (the deceased) and Mohamed Noor bin Mohamed were the one and same person', said that the plaintiffs had relied on two pieces of evidence to establish that fact. He had gone on to state as follows in the following manner, at paras 16–17 therein, as follows:

> 16. I however did not consider these two factors to be *sufficient* to conclusively hold that Md Noor bin Mohamed was also known as *Mohamed Noor bin Mohamed*, during the former's lifetime. There was no document of some legal effect or consequence, such as a statutory declaration, or any other affirmations or record that had been made during the lifetime of the deceased, produced in court to evidence that the two names had been interchangeably used to refer to the one and same person.
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> 17. It was definitely incumbent on the plaintiffs to adduce more convincing evidence to persuade the court to hold so from the perspective of this suit, where it was being canvassed by the plaintiffs, that the name of a duly registered owner of land, that was in the fashion, *Mohamed Noor bin Mohamed purportedly referred* to the individual by the name of Md Noor bin Mohamed. Md Noor bin Mohamed was, unless established otherwise on good and credible evidence, a different individual as borne out by a separate identity card issued and held by the deceased in that name, and also referred to accordingly in that name in the relevant subsequent death certificate and grant of letters of administration that were issued.

[12] It did not escape our notice that the learned trial judge had employed

the word 'conclusively' in para 16 as quoted above by us. Learned counsel for the plaintiffs had taken issue with this as proof of the fact that the learned trial judge had used the wrong standard of proof in cases involving fraud. It was contended by learned counsel for the plaintiffs that the correct standard ought to be the one on the balance of probabilities. We took note of that point as raised. But on further perusal, it must be noted that the learned trial judge's conclusion on this issue resides, as it had unfolded, in para 20 of his grounds of judgment, where he said:

> The onus to establish as a fact on cogent and credible evidence that Md Noor bin Mohamed (the deceased) was the one and same individual as *Mohamed Noor bin Mohamed* was always with and remained with the plaintiffs; cogent and credible evidence in this case would have to necessarily be some official or legally acceptable material attesting to that claimed fact and not mere surmises as relied on here by the plaintiffs. *The plaintiffs, therefore in my evaluation of the evidence, had failed to discharge this burden on a balance of probabilities on the totality of material placed before the court.* (Emphasis added.)

DISCUSSION ON THE ISSUES

[13] At this juncture, we would advert to the matter of the standard of proof applicable in a case of this nature. Being a civil claim by the plaintiffs, the applicable standard of proof in play must necessarily be the one on the balance of probabilities. Until recently, where an allegation of fraud had been pleaded by the plaintiff, the applicable standard of proof had been the one that was beyond reasonable doubt. That used to be the trite law in place. However, late last year, our apex court in the case of *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584 ('*Sinnaiyah & Sons Sdn Bhd* case') had ruled that the applicable standard of proof in civil cases involving an allegation of fraud is one on the balance of probabilities. As to what a standard of proof on the balance of probabilities would entail could be better understood by reference to the English family case of *In re H and others (Minors) (Child Sexual Abuse: Standard of Proof)* [1996] AC 563 at p 586 where Lord Nicholls of the then House of Lords had explained that it was a flexible test:

> The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not ... Built into the preponderance of probability standard is *a generous degree of flexibility in respect of the seriousness of the allegation*. Although the result is much the same, *this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established*. (Emphasis added.)

[14] Clearly therefore, such a standard of proof does not require *conclusive* proof. We are of the view that the words of Lord Nicolls in the *In re H (Minors)* case would explain what is inherent in the standard of proof on the balance of probabilities. As to the applicability of that standard of proof as settled by the *Sinnaiyah & Sons Sdn Bhd* case it was submitted before us by learned counsel for the plaintiffs that the applicable standard had been ruled by the apex court to be one on the balance of probabilities. It was also submitted before us that such a standard ought to be applicable in this case because this case has not been ventilated to its ultimate conclusion, thereby qualifying it to be categorised as a 'future' case as stated in the *Sinnaiyah & Sons Sdn Bhd* case. It was contended by learned counsel as well that the fact that plaintiff's case was still in the appeal stage would be a clear testament to that fact. It is therefore indeed a live litigation. In this immediate appeal, the learned trial judge had initially subjected the evidence to the standard of beyond reasonable doubt in his quest to see whether the allegation of fraud had been established by the plaintiffs. He had found that to be in the negative. He then opined that even on the lower standard of proof premised upon a preponderance of evidence, that is, on a higher degree of probability, he found that the plaintiffs had also failed to so establish that factual circumstance of fraud (see the case of *Lee Kim Luang v Lee Shiah Yee* [1988] 1 MLJ 193 as an example, as cited by the learned trial judge).

[15] So, it all had boiled down to the question of whether the evidence as adduced before the learned trial judge was sufficient to discharge the necessary standard of proof in play. In the context of discharging the burden on the balance of probabilities, the pertinent question to be asked is this: 'what is the difference between succeeding on the balance of probabilities and failing on the balance of probabilities?' We were reminded of the statement by Lord Denning J (as he then was) in the case of *Miller v Minister of Pensions* [1947] 2 All ER 372 where he had said:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[16] Of course, in the context of having to prove a case on a beyond a reasonable doubt standard, the converse is true, the requisite quantum of proof must necessarily be comparatively higher.

[17] But, be that as it may, we had proceeded to scrutinise at the evidence led by the plaintiffs before the learned trial judge in its totality. We are of the view that the evidence as led by the plaintiffs must be taken and considered as a whole, and not in isolation. The court will have to view the cumulative effect of the totality of the evidence as presented by parties in the course of the trial. Granted that, there was no direct evidence pointing conclusively to the fact the name 'Md Noor bin Mohamed' referred to the very same person by the name 'Mohamed Noor bin Mohamed'. There are numerous evidence led in the trial,

mostly by the plaintiffs which, taken together, was submitted by learned counsel for the plaintiffs that had the effect of establishing the factual circumstance that the two names as described above had referred to the same person.

[18] Those evidence have been as follows: First, there was the uncontroverted evidence that the power of attorney, appointing the first defendant as the attorney, pursuant to which the first defendant sold and transferred the land to the third defendant and was purported to have been executed by one 'Mohamed Noor bin Mohamed' (NRIC No 250502–07–5013) was a forged document. The first defendant did not present himself in court during the trial proceedings. He could have shed more light on the genesis of the power of attorney and the identity of the person named as Mohamed Noor bin Mohamed in the power of attorney could have been explained away. Secondly, the deed of indenture shows the purchase of the land by Mohamed Noor bin Mohamed is dated 4 July 1934. There was clear inherent lack of logic pertaining to this based on the surrounding factual circumstances of this case which would render the credibility of that power of attorney document suspect. It was in evidence that the power of attorney purportedly created by the said Mohamed Noor bin Mohamed was dated 26 November 2004, nearly 70 years after he executed the deed of indenture. If the imposter had acquired the said property at the age of 18 years (the competent age of majority to acquire property) he should now be 88 years old. Also, it would be rather improbable that a person as young at that time could afford to pay the princely sum of $210 way back in 1934. Furthermore, the imposter could not have attained the conveyance of the property in 1934 as that would mean that he had bought the property when he was only nine years of age. This incredible circumstance was brought to bear based upon the fact that from the purported identity card of Mohamed Noor bin Mohamed, the person named in the power of attorney, based on the number assigned to him, he was born in 1925 and the deed of indenture was dated 4 July 1934. Section 2 of the Age of Majority Act 1971 clearly states that the age of majority is 18 years old. A person is only legally competent to enter into a contract once he has attained that age. There was no evidence coming from the defendants that in 1934 what the age of majority was. It would be inconceivable that a person as young as nine years old was then competent to enter into a commercial contract such as the one as evidenced by the deed of indenture. In contrast, the deceased father of the plaintiffs was 33 years old at the time of purchase of the land and was gainfully employed as a teacher earning an annual salary of about RM3000. Thirdly, the evidence from the NRIC of the appellants' siblings showed that the spelling of deceased's name was interchangeably used where he was referred to as their father. As illustrations, the plaintiffs' siblings Ozair and Zuariyah Zalikha had their father's name spelt as 'Mohamed Noor' and not Md Noor. Fourthly, there was the evidence from the statement of service pertaining to the deceased. There, it was also shown that the spelling of the name of the

deceased was interchangeably used. The statement of service of the deceased as a teacher can be found in the bundle of documents marked as RRP 3(1). At p 1240 the name was spelt as 'Md Noor bin Mohamed.' At pp 1241–1243 his name was spelt as 'Mohamed Nor bin Mohamed.' And fifthly, there was deceased's identity card No 0271900 that was issued to the deceased in place of the old IC No P286317 in the name of Mohamed Noor bin Mohamed that also appeared in the statement of service referred to above. These evidences were led by the plaintiffs to show that Mohamed Noor bin Mohamed and Md Nor bin Mohamed was one and the same person.

[19] In light of the above related evidence led by the plaintiffs, with respect, we are of the considered view that there is justification in the complaint advanced by the plaintiffs' learned counsel. We are fully aware that an appeal court, such as this court ought not to disturb the findings of facts made by the learned trial judge as he, as the primary trier of facts has the distinct advantage of observing the demeanour of witnesses who had appeared before him. The appeal court would, as a general rule defer to his findings as such. Nevertheless, the appeal court will interfere with the findings made by the trial judge, if his findings could not be supported in light of the available evidence as led before him. We reiterate the settled principle as elucidated in the case of *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2014] 9 CLJ 337 where Justice Mohamed Ariff Yusof JCA had occasion to say, at pp 179–180 (MLJ); pp 348–349 (CLJ) as follows:

> [15] We are of course mindful, and keep the principles uppermost in our mind, that appellate intervention should only upset the decision of a trial judge if it can be demonstrated that the judge was plainly wrong. We acknowledge that the trial judge had the audio-visual advantage of the trial process, but nevertheless the issue is whether despite having that advantage, the judge has been plainly wrong in her evaluation and findings. It suffices to refer to the Federal Court decision in *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577; [2010] 6 CLJ 857, where James Foong FCJ dealt with the applicable principles comprehensively, as follows:
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> > [41] ... we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge. This 'plainly wrong' test has been long established and can be observed in the judicial committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 where Lord Fraser said:
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> > > In the face of that finding by the trial Judge on the question of fact the Federal Court were only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion, as the authorities already quoted show.

Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge.

The first is Lord Tankerton in Watt or *Thomas v Thomas* [1947] AC 484:

> (1) where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
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> (2) the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> (3) the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court ...

[20] Having alluded to the settled principle in play, we are of the view that the circumstances in this appeal before us have justified our intervention with regard to the learned trial judge's findings of facts on the crucial issue pertaining to the names under scrutiny.

[21] It did not escape our attention as well that the defendants did not attempt to produce the material witness to lead evidence to counter the plaintiffs' evidence on this issue. In light of the evidence given, inter alia, by PW4, Puan Junaidah from the National Registration Department, to the effect that the identity card number referred to in the power of attorney as belonging to one 'Mohamed Noor bin Mohamed' was false, and therefore rendering the power of attorney a forgery, no attempt was ever made by the defendants to produce the so-named person 'Mohamed Noor bin Mohamed' in court during the court proceedings to assert otherwise. The forged power of attorney asserted that the donor 'Mohamed Noor bin Mohamed' was the owner of the said subject land. This is a factual assertion that is in stark contradiction to that asserted by the plaintiffs. He therefore had to prove that contrary assertion. Failure to produce him in court to testify to that fact must attract the presumption of adverse inference under s 114(g) of the Evidence Act 1950 against the defendants. The presumption being that the witness was not called because had he been called to testify, his evidence would be adverse against the party that calls him. Neither was the first defendant produced as a witness. The first defendant was a bankrupt and he was the person who had used to forged power of attorney to register the transfer of the said land to the third defendant.

So, apart from cross-examining the plaintiffs' witnesses on their testimonies and on the documents, the defendants did not lead any evidence pertaining to the forged power of attorney, the very source of the problem in issue.

[22] Neither was it the case of the defendants that the plaintiffs had failed to establish a prima facie case for them to answer at the end of the plaintiffs' case. There were no submissions by the defendants at the end of the plaintiffs' case to that effect. Such being the case, it became incumbent on the defendants to lead evidence to contradict the plaintiffs' case and the court, at the end of the whole case would then have to look at the whole evidence before it, in order to rule which of the litigating parties had proven its case on the balance of probabilities (see the Federal Court case of *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509).

[23] At this juncture, we feel that it would be pertinent for us to address as well the issue raised by the learned counsel for the third defendant that the plaintiffs had failed to adduce the deed of indenture which they averred was in their possession but which they did not adduce when they or their witnesses were testifying in court during the trial. On that score, it was submitted that the plaintiffs must be held to have failed to establish their claim. Again, we have to advert to the fact that the defendants never submitted that there is no case for them to answer at the conclusion of the plaintiffs' case. Instead, they had led evidence to establish their version of events. That being the position that was pursued by the defendants, the court had therefore become obliged to look at the available evidence led by both parties in the proceedings in coming to the proper conclusion at the end of the whole case. It would be a gross error on the part of the court to not consider evidence that were properly admitted in court. In this case, the notes of proceedings had shown that there were two deeds of indenture that were produced during the defence case and both of them were tendered through DW4 and they were marked accordingly as court exhibits. Exhibit P36 was the deed of indenture pertaining to the land, in the possession of the plaintiffs but was tendered by the plaintiffs through DW4, whereas exh D37 was the deed of indenture that was in possession of the land office pertaining to the land produced by the defendants, also through DW4. So both exhibits were admitted in evidence and were properly marked as such. That being the case, these two exhibits had formed part of the evidence in the trial which must be considered by the trial judge. It would not matter who had tendered the evidence in court. As long as the evidence was properly admitted, they deserved to be considered together with the rest of the evidence and effect must be given to it accordingly in the overall scheme of things that parties needed to prove their respective cases. We find support for this proposition from the decision of this court in the case of *Tan Kah Khiam v Liew Chin Chuan & Anor* [2007] 2 MLJ 445 ('*Tan Kah Khiam* case'). What the court in that case

said was very illuminating indeed. We reproduce part of the decision which is relevant to the point at hand, like so:

> But, entirely to the credit of the plaintiff's counsel, he managed, during cross examination to obtain an admission from the defendants' witness that the plaintiff had asked for 'tea money'. That in my view was sufficient proof of the plaintiff's averment that those words had been attributed to the plaintiff. In a civil case, one party's evidence is the other's as well. So, a plaintiff may rely on the defendant's evidence to prove his or her case. The converse is also true (see the observations of Hashim Yeop A Sani SCJ in *M Mahadevan v S Lourdenadin* [1988] 2 MLJ 371).

[24] In fact, the circumstances in this case were not much different from the circumstances that had obtained in the *Tan Kah Khiam* case in that it was through the witness of the defence ('DW4') during cross-examination that the plaintiffs' deed of indenture was tendered as evidence. That deed of indenture of the plaintiffs (exh P36), albeit tendered through DW4, taken together with the other evidence led by the plaintiffs had established the claim over the ownership of the land over the defendants, in particular against first and third defendants. As such, with respect, the learned trial judge had fallen into error when he held the view that the plaintiffs had failed to produce their professed deed of indenture. On the contrary, that document was indeed admitted as evidence in court which ought to have been considered by the learned trial judge, but was not. There had therefore been a misdirection by way of non-direction of a material evidence (exh P36) by the learned trial judge.

[25] In the circumstances, we are of the respectful view that the learned trial judge was in error when he said in para 18 the following:

> Further, there was no legal obligation on any of the defendants to produce the person of or otherwise establish that Mohamed Noor bin Mohamed was another individual altogether, that is, quite apart from Md Noor bin Mohamed. It was the plaintiffs who were asserting that both the names referred to the same individual and the burden was therefore solely on the plaintiffs to prove the existence of that fact. (Sections 101 and 103 of the Evidence Act 1950.)

[26] With respect, while we can see where the learned trial judge was coming from as to where the eventual burden of proof ought to lie, in the circumstances of this case, in particular, from the manner in which the defence was managed, it was incumbent too, on the defendants were address the issue sufficiently. To our mind, what better way to do it than to call the person named 'Mohamed Noor bin Mohamed' who had given the power of attorney to the first defendant to testify and be cross-examined in court during the trial. By producing him, all doubts would have been dispelled in respect of the true identity of the owner of the said land in question. But what we have now before us is the uncontroverted fact that the number of the IC stated in the power of attorney attributed to one by the name of Mohamed Noor bin Mohamed, was

actually a number which issued by the National Registration Department to one by the name of Ismail bin Nordin (see appeal record Vol 2(2) p 307). How that fact could work in favour of the defendants is indeed very difficult for us to fathom. That falsity in the power of attorney had rendered it a complete forgery and the subsequent registration obtained by using such a forged instrument must of necessity make the title so issued in favour of the third defendant, not indefeasible, namely defeasible by virtue of s 340(2) of the National Land Code ('the NLC').

[27] We are aware of the fact that leave had been granted by the apex court to ventilate the issue as to *when* the new standard of proof as enunciated in the *Sinnaiyah & Sons Sdn Bhd* case ought to apply? In other words, when would be the cut-off date of its applicability? In short, what does the apex court mean by reference to 'future' cases in its judgment? Nevertheless, in the context of the circumstances obtaining before, regardless of whatever the standard of proof against which the plaintiffs' evidence may be subjected to, having considered the evidence, we are satisfied that the plaintiffs had discharged their attendant burden to prove their case, on both counts, namely that: (a) the two names had referred to the same one person, being the deceased father of the plaintiffs; and (b) the fraud had been perpetrated by the first defendant by way of using a forged power of attorney in the land transaction which document was also used to obtain the transfer of the land's title into the name of the third defendant.

[28] The other issue had been the issue of indefeasibility or otherwise, of the title that was purportedly passed to the third defendant by the said transfer by the first defendant. The plaintiff submitted that the title of the land, if at all it was transferred to the third defendant was not indefeasible. It was the contention of the plaintiffs that the transfer was affected by way of a void instrument, namely vide a forged power of attorney. The fact that the power of attorney was a forgery could not be disputed. The plaintiffs testified that the land was never transferred by their deceased father and that the power of attorney was never signed by their late father. The NRIC number purportedly to be that of Mohamed Noor bin Mohamed on the power of attorney actually belonged to one by the name of Ismail bin Nordin. That information came from PW4, an officer from the Department of National Registration. Neither the first defendant, nor the person 'Mohamed Noor bin Mohamed' was called by the defendants to rebut the plaintiffs' evidence on the power of attorney. Therefore it is clear that the defendants did not even bother to usefully challenge the plaintiffs' version on the status of the power of attorney. So, the factum of forgery in so far as the power of attorney was concerned was established beyond a reasonable doubt. Section 340(2) of the NLC is clear. A title may be impugned and indeed becomes susceptible to defeasibility if its registration has been obtained by way of a forged instrument (see the case of

Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269 ('*Tan Ying Hong* case').

[29] However, the learned trial judge had approached this issue of defeasibility of the title to the land by looking at the pleadings of the plaintiffs and he subsequently had ruled that the plaintiffs' statement of claim had not sufficiently pleaded the s 340(2) of the NLC issue. In short, it was a pleading point in that parties are bound by what they had or had not pleaded in their pleadings. In other words, the learned trial judge was of the view that s 340(2) of the NLC was never the pleaded case of the plaintiffs. We now would reproduce the part of his grounds of judgment where the learned trial judge had expressed such view:

> 24. It must be reiterated that there was no allegation in the pleadings that the use of *'forged, insufficient or void instrument'* formed the basis of this suit by the plaintiffs to void the transfer. If that was to be the cause of complaint, then the plaintiffs had to specifically plead and raise that distinct ground to invalidate the transfer or the creation of the subsequent charge. There was none and the plaintiffs had therefore to be bound by and restricted to their own pleadings, namely para 18 of their statement of claim. (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 SC).

[30] Learned counsel for the plaintiffs had complained before us that the learned trial judge was in error when he had so concluded against the plaintiffs on the pleadings point. Having considered the respective submissions by parties on this point, we are with learned counsel for the plaintiffs in that the learned trial judge had erred. We had occasion to scrutinise at the pleadings in the statement of claim of the plaintiffs. With respect, we agree with the plaintiffs that the point on forgery in relation to the power of attorney was pleaded in para 18(i) of the said statement of claim. We now reproduce the said paragraph as contained in the said pleadings:

> 18(i) Defendan Pertama telah menggunakan Surat Kuasa Wakil yang telah dipalsukan untuk menjual Hartanah Tersebut secara frod kepada Defendan Ketiga dan memperolehi wang jualan jualan sebanyak RM385,388.22 untuk kegunaaan sendiri.

[31] A perusal of the grounds of judgment of the learned trial judge had shown that while he had adverted to para 18 of the statement of claim and found that forgery was not pleaded, he nevertheless did not specifically refer to para 18(i) quoted above. In our considered view, that para 18(i) was sufficient to convey the meaning that the title that was registered in the name of the third defendant was obtained by using the forged power of attorney. In the circumstances, the reliance by the learned trial judge on the case of *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 SC was misplaced as a direct result of his misreading of the pleadings as contained in the statement of claim of the plaintiffs. It is our view that para 18(i) was sufficient to bring the required

notice to the defendants that the title was obtained through the use of the forged power of attorney when the sale of the land was transacted between the first and the third defendants. Section 340(2) of the NLC reads: '(b) where the registration was obtained by forgery, or by means of an insufficient or void instrument' then a title so obtained can be defeated. As indeed the evidence had shown that the forged power of attorney was used to affect the impugned transfer. To our mind, this has not been a case of non-pleading but one on the sufficiency or otherwise, of pleadings by the plaintiffs.

[32] It was therefore clear to our mind that there is merit in the plaintiffs' complaint with regard to the learned trial judge's finding on the matter. To our mind, such a pleading as appearing in para 18(i) of the statement of claim has constituted a sufficient and adequate notice to the defendants that the plaintiffs were mounting a challenge against the title which was obtained by the third defendant way of a forged instrument. Premised on that finding on the pleadings' issue, s 340(2) of the NLC must kick in to render the title obtained by the third defendant defeasible.

[33] We say so because under the law as it now stands, it would not matter whether the third defendant was aware of the forgery pertaining to the power of attorney. As is trite, no good title can pass in such a situation from the purported vendor to the third defendant. As an *immediate* buyer or purchaser, its title is bad. Its stated defence where it had asserted that it was a bona fide purchaser for value and that the whole transaction was done through solicitors representing the vendor, purchaser (the third defendant) and the chargee bank (the sixth defendant) would not afford him any measure of cover at all as against the true registered owner of the land whose name appeared on the register of titles prior to its name being so registered. Its remedy may well lie elsewhere and that cause of action may well be founded upon contract or tort for the injury that it had suffered.

[34] But as regards a *subsequent* purchaser who deals with the land with the third defendant, he may find sanctuary under the proviso to s 340(3) of the NLC, provided he is a bona fide purchaser for valuable consideration. Under the NLC regime, this is known as the *deferred* indefeasibility. This clearly is an exception to the *nemo dat quod non habet* principle, which literally means that no one can give what he does not have. Under the English common law, it is quite simply stated that no one can give a better title than what he himself possesses. Much less, if he has none to begin with. On the other hand, as is clear to all and sundry, the concept of deferred indefeasibility is a unique and peculiar creation of statute under the NLC.

[35] We would now state the legal position in play in the circumstances of this case. There used to be some serious confusion as to what that legal position

was until the apex court came up with its decision in the case of *Tan Ying Hong* case. In essence, what *Tan Ying Hong* case decided, among others, has been that the immediate purchaser could not take advantage of the provisions contained in the proviso to sub-s (3) of s 340 of the NLC In effect, what that means is that under s 340(2) of the NLC, if one is the immediate purchaser, it would not matter whether he was a bona fide purchaser for value, as long as the registration of the title that contained his name had been obtained by way of a void instrument, his title so obtained 'shall not be indefeasible'. The benefit under the proviso to sub-s 340(3) of the NLC is applicable *only* to the subsequent purchasers referred to in sub-s (3) to s 340 of the NLC as is clearly expressed in the said proviso which is couched as follows, 'Provided that nothing in *this subsection* ...' (Emphasis added.) Obviously, the relevant subsection referred to in the proviso must relate back to sub-s 3 to s 340 of the NLC. It has no application to sub-s (2) to s 340 of the NLC. That proviso is native only to sub-s 3 to s 340 of the NLC. Its application is therefore fully circumscribed. That proviso does not migrate to any other provisions even within the same s 430 of the NLC. In the case of *Gajo Ram Basant Ram and anr v State of Bihar* AIR 1956 Pat 113 it was held that a proviso to a subsection would not apply to another subsection. In yet another case, it was held to the effect that a proviso carves out an exception to the provision immediately preceding the proviso and to no other (see the case of *Ram Narain Sons Ltd v Asst Commissioner Of Sales Tax* 1955 AIR 765).

[36] With respect, therefore it is our considered view that it was wrong for the learned trial judge to have ruled the way he did that the title obtained by the third defendant was indefeasible in light of the fact that the transfer form that was used to gain registration of the title into its name was vitiated by the use of the forged power of attorney. To our mind, that would be caught by s 340(2)(b) of the NLC as a result of which no good title for the land could, under the existing law, be obtained by the third defendant. This court had, in the recent case of *Heveaplast Marketing Sdn Bhd v See Leong Chye @ Sze Leong Chye and 3 ors* Civil Appeal No B-01–489–12 of 2014 expressed similar stand on the operation of s 340 of the NLC following in the footsteps of the apex court decision in *Tan Ying Hong* case which had ruled on the applicability of the proviso to sub-s 3 of s 340 of the NLC to bona fide subsequent purchaser or holder of interest in the land in question. With respect, we would follow suit as well as we are indeed bound by what was decided in the *Tan Ying Hong* case. The legislative intent could not have been more clearly expressed.

[37] In the circumstances of this appeal therefore, while the third defendant gets no good title, nevertheless, the sixth defendant ('the CIMB chargee'), being a subsequent bona fide holder of interest in the registered charge for valuable consideration, gets indefeasibility and therefore can still retain its charge on the land. It will be recalled that the plaintiffs' counsel had indicated

to us during oral submissions that they were abandoning their appeals against the fourth, fifth and sixth defendants. The fourth defendant was the Pentadbir Tanah Daerah Barat Daya, Pulau Pinang (being the relevant land office) while the fifth defendant, Ahmad Rizal bin Abdul Hamid, was the solicitor who had handled the sale and purchase agreementbetween the first defendant and the third defendant and the sixth defendant CIMB Bank Bhd, was the registered chargee CIMB Bank.

[38] The other had issue related to the limitation issue. Suffice for us to state here that in the circumstances, as forgery, which is a species of fraud, was involved, the plaintiffs were not caught by limitation. In the *OCBC Bank* case, Justice NH Chan JCA had occasion to say the following:

> The words which I have emphasised (in the judgment of Lord Lindley above) denote 'forgery' as within the meaning of 'fraud'. Where it is desired to rely on s 340(2)(a) as a means to invalidate a registered title or interest in a case of forgery, then forgery is to be treated as a species of fraud.

[39] Suffice for us to say that we find no reason to disagree with His Lordship in that regard. Section 29 of the Limitation Act 1953 clearly states, among others, that the period of limitation prescribed by the Act shall not begin to run until the plaintiff has discovered the fraud. In this case, the undisputed facts had shown that the plaintiffs only discovered that the land was transferred by Azman bin Ahmad ('the first defendant') into the name of Sankaran Enterprise Sdn Bhd ('the third defendant') on the 28 January 2010. The plaintiff had subsequently filed in court this action on 16 April 2012. As the prescribed time to file for recovery of land is 12 years as provided for under s 9 of the Limitation Act 1953, it is therefore clear that the plaintiffs were well within the prescribed time when they filed this action against all the defendants.

[40] So, to recap:

(a) whether the names 'Md Noor bin Mohamed' and 'Mohamed Noor bin Mohamed' referred to one and the same person, the plaintiffs had through evidence, both oral and documentary (including the deed of indenture P36) established that 'Mohamed Noor bin Mohamed' was another manner in which the name of their deceased father 'Md Noor bin Mohamed' was spelt. There was nothing forthcoming from the defendants, except for the deed of indenture D37, to show that the person named as 'Mohamed Noor bin Mohamed' in the power of attorney was the same person similarly named in the deed of indenture, either on D37 or P36. The donor of the power of attorney was not produced in court nor did the D1 appear in court though he was duly served with the writ by the plaintiffs. Taken in its totality, in our view,

between the two opposing contentions, the plaintiffs had successfully proven their version on this issue on the balance of probabilities;

(b) on the issue of whether the power of attorney was a forgery, thus a species of fraud, the evidence of the JPN officer (PW4) stating that the IC number purportedly attributable to the donor was a fake because based on the official records kept by the JPN that IC number was assigned to one Ismail bin Nordin. There was no challenge whatsoever on this critical and damaging evidence from PW4 coming from the defendants. Such evidence had therefore established the falsity of the IC number conclusively. That had rendered the power of attorney a forgery. As a result, the third defendant's registered title of the land, under its name was therefore not indefeasible by operation of s 340(2)(b) of the NLC. In other words, the third defendant did not get any good title as he was the *immediate* purchaser from the fraudster that was Azman, the first defendant. But the sixth defendant, being a subsequent holder of interest on the land by virtue of it being a registered charge of the land and therefore a subsequent transaction, gets good and indefeasible interest (see *Tan Ying Hong*'s case);

(c) as a corollary to that finding, it is our view that the pleadings were sufficient to found the plaintiff's cause of action mounted by the plaintiffs against the defendants;

(d) on what standard of proof was applicable to establish forgery, a species of fraud, we are of the considered view that whatever the standard of proof was applicable on the plaintiffs, the evidence as they stood had established that fact even on the higher standard of proof beyond reasonable doubt; and

(e) on limitation, this case was not caught by limitation as the fraud was discovered only recently in 2010 and the case was filed in 2012, well within the prescribed time to file the action for recovery of land. Sections 29 and 9 of the Limitation Act are applicable.

[41] In the upshot therefore, we are allowing this appeal by the plaintiffs *in part* and the order of the learned trial judge is hereby *varied* accordingly to reflect the decision of this court, as follows: (1) the transfer of the said land to the third defendant is set aside; (2) the charge being a subsequent interest so registered by the sixth defendant remains good and therefore valid under the law. So the land will be reverted to the plaintiffs subject to the sixth defendant's charge over it. We took note that the plaintiffs had prayed for the third defendant to take all steps necessary to effect the transfer of the land back to the plaintiffs within 30 days from the date of this court's order. We now so order, but it shall be registered in the name that appeared on the title deed before it was transferred into the name of the third defendant, but the charge as

endorsed on it in favour of the sixth defendant shall remain therein; (3) In the event that the third defendant fails to comply with the order in (2) above, notwithstanding the remedies and/or reliefs legally available to the plaintiffs, the relevant land administrator is hereby ordered to execute any such documents and do all such things to give effect to our order.

[42] That now brings us to the issue that pertains to encl 56. This enclosure had been concerned with an application by the plaintiffs to enter judgment in default against the first defendant who did not make any appearance despite having been properly served with this action. It was filed before the trial before the learned trial judge began. It was deferred by the learned trial judge as he was of the view that in cases involving allegation of fraud, some evidence would have to be led before the court before a judgment in default could be entered against such a defaulting defendant. The learned trial judge was correct in his approach. However, as we have set aside his decision in the main trial in light of our above stated reasons, we hereby allow the encl 56 in terms as prayed for against the first defendant with costs of RM10,000 subject to the payment of allocator to the appellant. It was clear from the unrebutted evidence that the power of attorney was a forgery and the first defendant was the person who had dealt with the power of attorney that had since led to the dispute between the various litigating parties. By being absent during trial, he had lost the opportunity to present his version of the event, especially as regards the crucial issues pertaining to the power of attorney and its purported donor, and with that, his fate must accordingly be sealed to his own detriment.

[43] It is quite apparent that the plaintiffs could be heard to complain that they had been hard done by, to a certain extent, by the order of this court, but the concept of deferred indefeasibility is a unique creation of statute that is the NLC. Section 340 on indefeasibility of registered title therein is clear especially the proviso under sub-s (3) thereof and the apex court had made a ruling as to its effect in the case of *Tan Ying Hong*. In this regard, the law is trite. Where a statutory law is clearly expressed, equity has no role to play. Whatever other remedy which ought to be meted out, unfortunately resides outside the four walls of the court.

[44] As to costs, having heard submissions, we hereby order that the third defendant to pay costs of RM30,000 to the plaintiffs. However, the plaintiffs are ordered to pay costs to the fourth and fifth defendant the sum of RM5,000 each, and to the sixth defendant, the sum of RM10,000. All payment of costs are subject to payment of allocator by the winning parties. We also order that the deposit be returned to the plaintiffs.

We have so ordered accordingly.

A *Appeal allowed in part.*

Reported by Afiq Mohamad

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